Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1976

No. 76-1450

LANDMARK COMMUNICATIONS, INC.,
Appellant,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

On Appeal From The Supreme Court Of Virginia

MOTION TO AFFIRM THE JUDGMENT OF THE SUPREME COURT OF VIRGINIA

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PRELIMINARY STATEMENT

The appellee, Commonwealth of Virginia, respectfully moves this Honorable Court to affirm the judgment of the Supreme Court of Virginia entered on March 4, 1977, affirming the appellant's conviction in the Circuit Court of the City of Norfolk, Virginia.

OPINION BELOW

The judgment of the Supreme Court of Virginia has not been reported as of this time, but is set forth in full in the Appendix to the Jurisdictional Statement, pp. 1a-20a.

JURISDICTION

Appellant asserts that the jurisdiction of this Court is conferred by 28 U.S.C. § 1257(2).

QUESTIONS PRESENTED

1. May the Commonwealth of Virginia subject persons, including newspapers, to criminal sanctions for divulging information regarding proceedings before the State Judicial Inquiry and Review Commission, where such proceedings are expressly declared to be confidential by the State Constitution and Statutes?

2. Is the Commonwealth of Virginia required to produce actual facts of a clear and present danger to the administration of justice to support a conviction under Virginia Code Section 2.1-37.13, where such determination has been made in the State Constitution and Statute?

3. Is Virginia Code Section 2.1-37.13 unconstitutionally vague and overbroad in violation of the First and Fourteenth Amendments to the United States Constitution?

I.

The Commonwealth May Impose Criminal Sanctions For Divulging Information Regarding Proceedings Before The State Judicial Inquiry And Review Commission.

As noted by the Supreme Court of Virginia, the principal question in this case involves a confrontation between the

First Amendment guarantee of freedom of the press and the Virginia statute which imposes criminal sanctions for breach of the confidentiality of proceedings before the Judicial Inquiry and Review Commission ("Commission").

At the outset, it is critical to set out clearly what this case does not concern. This case does not involve a prior restraint. No injunction was sought to prevent Landmark from publishing the article in question, and the Supreme Court of Virginia found the case to involve subsequent punishment rather than prior restraint. This finding of the Supreme Court of Virginia is not being contested by Landmark upon this appeal. See Jurisdictional Statement, p. 8. Nor does this case present a situation where comment upon or criticism of a judge or the conduct of his judicial affairs is completely suppressed. The Supreme Court of Virginia specifically found that § 2.1-37.13 does not seek to discourage or curtail comment or criticism concerning a judge or the conduct of his judicial affairs (Appendix to Jurisdictional Statement, pp. 13a, 19a).

What this case does present is the right of a state, through its citizens and elected representatives, to declare certain matters of public interest to be confidential, and to punish those who breach that confidentiality.

The Commonwealth is fully cognizant of the rulings of this Court which hold that where the State places information in the public domain, it cannot restrain its publication. *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975); *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976); *Sheppard* v. *Maxwell*, 384 U.S. 333 (1968); *Craig* v. *Harney*, 331 U.S. 367 (1947); *Oklahoma Publishing Company* v. *District Court*, 97 S.Ct. 430 (1977).

The Commonwealth in this case, however, has followed the procedure outlined by this Court in *Cox Broadcasting Corp., supra*. In this regard, this Court stated:

> "If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information. Their political institutions must weigh the interests in privacy with the interests of the public to know and of the press to publish." 420 U.S. at 496.

The Commonwealth has complied with the dictates of *Cox* by the passage of § 2.1-37.13. First, the Commonwealth has taken Commission matters out of the public domain by providing that proceedings of the Commission are to be confidential. The papers filed with the Commission are not made a part of any public record, and the proceedings are conducted in private. In this case, the Commonwealth has neither made available the information published by Landmark nor has the Commonwealth given her implicit approval that the information be made public. *Cf., Oklahoma Publishing Company* v. *District Court, supra.* Second, the interests in privacy have been weighed with the interests of the public to know and of the press to publish. The Supreme Court of Virginia has found that § 2.1-37.13 represents a legislative declaration by the Virginia General Assembly, fortified by a plain statement of public intent expressed in the Virginia Constitution, that a clear and present danger to the orderly administration of justice would be created by divulgence of the confidential proceedings of the Commission.

The interests of the State in preserving respect for the judicial system on the one hand have been balanced with the interest of a free press on the other. In speaking of balancing competing interests, Mr. Justice Brandeis in *Whitney* v. *California,* 274 U.S. 357 (1926), said:

> "[A]lthough the rights of free speech and assembly are fundamental, they are not in their nature absolute.

> Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, economic, or moral." 374 U.S. at 373.

Section 2.1-37.13 has its genesis in Article VI, Section 10, of the Constitution of Virginia (1971). This constitutional provision itself provides that proceedings before the Commission shall be confidential. A. E. Dick Howard, who served as Executive Director of the Virginia Commission on Constitutional Revision, sets forth the necessity for confidentiality of Commission proceedings as follows:

> "Proceedings before the Commission must be confidential. The initial job of the Commission will be to ascertain which complaints have sufficient merit to deserve serious attention. Obviously there is the risk that a disappointed litigant may seek to vent his wrath upon the judge by filing a complaint with the Review Commission, or that complaints will be filed upon other vexatious and frivolous grounds. Such complaints must be weeded out—hence the requirement of confidentiality of Commission proceedings." A. Howard, *Commentaries on the Constitution of Virginia,* 764 (1974).

As noted by the Supreme Court of Virginia, the California experience furnishes support for the confidentiality of Commission proceedings:

> "A prime feature of the Commission plan for judicial discipline is that, unlike the impeachment, recall, and election processes, the charges, and investigation thereof, are not made public until and unless a recommendation for censure, removal or retirement is made to the Supreme Court. The proceedings are entirely confidential up to that point. This gives the individual judge and thereby the judiciary reputation protection until a full scale investigation has been made and a

> competent body of peers has made an adverse decision on the merits of the charge. The shield of confidentiality also preserves reputations while the corrective influence of the Commission is being exerted on a judge who would otherwise be reluctant to change his behavior lest the public view this as an admission of prior misconduct. . . . Thus, reputations are preserved while allowing ample opportunity for complete investigation and voluntary corrective action." Buckley, *The Commission on Judicial Qualifications: An Attempt to Deal With Judicial Misconduct*, 3 U.S.F.L. Rev. 244, 255-56 (1968-1969).

The American Bar Association has recommended that proceedings to review possible judicial misfeasance, nonfeasance and disability should be confidential unless the Commission recommends discipline by the highest court, at which time the Commission's record, upon being filed with the Court, should become public. A.B.A. Standards for Criminal Justice, *The Function of the Trial Judge*, § 9.1 (Approved Draft 1972). *Accord*, Reath, *Judicial Evaluation—The Counterpart to Merit Selection*, 60 A.B.A.J. 1246, 1248 (1974); Hazard, *Commission Introduces New Standards of Judicial Administration*, 60 A.B.A.J. 912, 914 (1974).

The criminal sanction provided by § 2.1-37.13 is nothing more than the remedy suggested in the views expressed by a number of justices of this Court in *New York Times Co.* v. *United States*, 403 U.S. 713 (1971) (White and Stewart, J.J., concurring) (Marshall, J. concurring) (Blackmun, J. dissenting).

As previously noted, this case does not involve a prior restraint. There exists a distinction between prior restraint cases and those involving subsequent punishment. It is based upon the theory that "a free society prefers to punish the few who abuse rights of speech *after* they break the law

than to throttle them and all others beforehand." *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 559 (1975). Accordingly, the "presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties." *Id.* at 558-59.

The restraint upon expression imposed by § 2.1-37.13 is narrowly limited, and it is related solely to the purpose sought to be served by the legislature: the preservation of the confidentiality of Commission proceedings. Newspapers, such as Landmark, as well as any person are free to comment upon or criticize any judge as they deem necessary and appropriate. Section 2.1-37.13 provides no impediment to such expression. The robust reporting and criticism of the criminal justice system spoken of in *Nebraska Press Ass'n.* v. *Stuart, supra*, is clearly alive and well in the Commonwealth of Virginia. The judicial system and members of the judiciary are routinely subjects of debate and criticism. It is only when the procedures of the Commission are sought to be invoked that the Commonwealth requires confidentiality, and even then § 2.1-37.13 provides confidentiality only to proceedings before the Commission. What is viewed in the public domain remains fair game for the press and public alike.

Freedom of the press is not absolute and beyond the reach of the state in appropriate circumstances. Mr. Chief Justice Hughes, writing for this Court in *Near* v. *Minnesota*, 283 U.S. 697, 708 (1931), noted that freedom of the press is not an absolute right, and the State may punish its abuses. The Virginia Constitution in its Bill of Rights speaks of the rights to free speech and the press, but also points out that one must be responsible for the abuse of that right. Article I, Section 12 of the Constitution of Virginia (1971).

In speaking to this very issue, the Supreme Court of

Virginia in *Weston* v. *Commonwealth*, 195 Va. 175, 77 S.E. 2d 405 (1953), had occasion to state the proposition concisely:

> "Freedom of speech is a right which the courts have zealously guarded and maintained. But the right has its limitations and the State may punish its abuse. The right may not be exercised in such manner as to destroy respect for the courts, the very institution which is the guardian of that right. The dignity of the courts and the duty of the citizens to respect them are necessary adjuncts to the administration of justice." 195 Va. at 183.

The Commonwealth fully recognizes the public interest in information pertaining to judicial discipline and in free debate upon the conduct of the judiciary. But, as found by the Supreme Court of Virginia, "the statute in question places the least possible restraint upon this public interest while, at the same time, it assures effective functioning of the Commission." The Supreme Court of Virginia concluded its opinion by holding that the necessity of maintaining the integrity of the Judicial Inquiry and Review Commission as an essential component in the administration of justice clearly outweighs any possible advantage of the public disclosure of the Commission's proceedings prior to the filing of a complaint with the Supreme Court of Virginia.

II.

The Commonwealth Is Not Required To Produce Actual Facts To Show A Clear And Present Danger To The Administration Of Justice To Support A Conviction Under Virginia Code Section 2.1-37.13.

Landmark asserts that the decisions of this Court require that before a State may punish a violation of a restriction

upon expression, it must satisfy the "clear and present danger" test. It is additionally maintained that this test requires the State to prove by "actual facts" that the expression it seeks to prohibit would result in an evil which is both substantial and imminent, posing a clear and present danger to a legitimate governmental interest. For its position, Landmark relies upon *Bridges* v. *California*, 314 U.S. 252 (1941); *Pennekamp* v. *Florida*, 328 U.S. 331 (1946); *Craig* v. *Harney*, 331 U.S. 367 (1947); *Wood* v. *Georgia*, 370 U.S. 375 (1962).

The Supreme Court of Virginia was unpersuaded that these cited cases controlled and found them to differ substantially from the present case. The Virginia Supreme Court found those cases to be concerned with the common law power of a court to punish allegedly contemptuous out-of-court statements concerning pending cases. As noted by this Court in *Bridges*, the imposition of sanctions in such circumstances was based upon a "concept of a most general and undefined nature." 314 U.S. at 260. This Court feared that without evidence of a clear and present danger, the undefined power of contempt would stifle the fair criticism of the judiciary.

In *Craig* v. *Harney, supra*, Mr. Justice Douglas, writing for the Court, points out clearly why those cases are distinguishable from the case now before this Court, when he said:

> "A trial is a public event. What transpires in the courtroom is public property. If a transcript of the court proceedings had been published, we suppose none would claim that the judge could punish the publisher for contempt. And we can see no difference though the conduct of the attorneys, of the jury, or even of the judge himself, may have reflected on the court. *Those who see and hear what transpired can report it with impunity.* There is no special prerequisite of the ju-

diciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censure events which transpire in proceedings before it." 331 U.S. at 374. (Emphasis added.)

By contrast, the Supreme Court of Virginia found that the power of a Virginia court to punish out-of-court statements of the type published by Landmark is fixed by statute, and the substantive offense for which punishment may be imposed is clear and well-defined. The fact that the legislature has dealt with this question by statute places this case upon an entirely different footing than the cases relied upon by Landmark. Indeed, in *Wood*, this Court stated:

> "Initially, however, it should be noted that the Georgia courts have determined that the power to punish for contempt of court is inherent in its state judiciary . . . and the Court of Appeals thus ignored the express limitations imposed by the Georgia Legislature in punishing out-of-court statements. . . . This holding thus deprives the judgment of coming to this Court 'encased in the armor wrought by prior legislative deliberation' . . . ." 370 U.S. at 385-86.

It was also recognized in *Bridges*, that a declaration of a State's policy weighs heavily in any challenge of the law as infringing constitutional limitations. In this regard, this Court stated:

> "It is to be noted at once that we have no direction by the legislature of California that publications outside the courtroom which comment upon a pending case in a specified manner should be punishable. As we said in *Cantwell* v. *Connecticut*, 310 U.S. 296, 307-308, such a 'declaration of the State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations. . . .' [H]ere the legislature of California has not appraised a particular kind of situation and found a specific danger . . . sufficiently imminent to justify a restriction on a particular kind of utterance. The judgments below, therefore, do not come to us encased in the armor wrought by prior legislative deliberation. Under such circumstances, this Court has said that 'it must necessarily be found, as an original question,' that the specified publications involved created 'such likelihood of bringing about the substantive evil as to deprive [them] of the constitutional protection.' " 314 U.S. at 260-61.

This case, unlike those relied upon by Landmark, comes to this Court not upon some uncircumscribed common law power of contempt, but encased in the armor wrought by prior legislative deliberation. The Supreme Court of Virginia found that the sanction imposed by § 2.1-37.13 "springs from a clear and well-defined legislative declaration that breach of the confidentiality of Commission proceedings is so contrary to the public interest that it constitutes a substantive evil of immediate and serious peril to the orderly administration of justice and, therefore, should be punishable."

The Supreme Court of Virginia went further to observe that minor matters of public inconvenience or annoyance could not be raised to the position of warranting the curtailment of liberty of expression simply by the passage of legislation. The Court recognized that historically the methods of dealing with disabled or unfit judges by legislative impeachment or removal were seldom used and generally unsatisfactory. These inadequacies led Virginia to join over 40 other states in adopting a commission or other bodies to investigate complaints against judges.

After reviewing the necessity for confidentiality of Commission proceedings the Supreme Court of Virginia found that confidentiality (1) protects the reputation of an in-

dividual judge by shielding him from publicity involving frivolous complaints, (2) protects public confidence in the judicial system by preventing disclosure of a complaint against a judge until the Commission has determined the charge is well-founded, and (3) protects complainants and witnesses from possible recrimination by prohibiting disclosure of their identity prior to a determination that the complaint is meritorious. These findings are supported by legal writers. *See* Gasperini, *Judicial Review in New York: A New Look,* 40 Ford.L.Rev. 1 (1970); Note, *Remedies For Judicial Misconduct and Disability: Removal and Discipline of Judges,* 41 N.Y.L.Rev. 149 (1966); Note, *The Commission Removal Plan: A Corrective Remedy for Judicial Misconduct in Iowa,* 55 Iowa L.Rev. 1020 (1969).

The Supreme Court of Virginia concluded that these were matters involving a serious and substantial evil which did not require courtroom evidence to sustain their truth and validity. Considering these matters, the Court held that:

> "It can be said safely, without need of hard in-court evidence, that, absent a requirement of confidentiality, the Judicial Inquiry and Review Commission could not function properly or discharge effectively its intended purpose. Thus, sanctions are indispensable to the suppression of a clear and present danger posed by the premature disclosure of the Commission's sensitive proceedings—the imminent impairment of the effectiveness of the Commission and the accompanying immediate threat to the orderly administration of justice." 217 Va. .....

III.

Virginia Code Section 2.1-37.13 Is Not Unconstitutionally Vague Or Overbroad.

In the Supreme Court of Virginia, Landmark argued that § 2.1-37.13 was ambiguous in that the word "divulge" as

used in the statute was susceptible to differing interpretations. Landmark urged that the statute should be construed to mean that a violation would occur only upon the first act of disclosure by an individual who had actually participated in some manner in the proceedings of the Commission.

This position was decided against Landmark by the Supreme Court of Virginia. In arriving at its decision, the Court interpreted the word "divulge" to mean to disclose or make known. *Black's Law Dictionary,* 567 (4th ed. 1951). Applying this interpretation to this case, the Supreme Court held that when Landmark published its article it disclosed or made known to the public at large information which was still confidential. The Virginia Supreme Court concluded that so far as was pertinent to this case, only upon the filing of a formal complaint by the Commission in the Virginia Supreme Court did the matter enter the public domain. The Court held that the proscription of the statute was so clear that it would be unreasonable to construe it to mean that only the participants in a Commission proceeding are subject to the proscribed sanctions or that only the first disclosure of confidential information was actionable.

In the area of examining state statutes for vagueness, this Court has said the doctrine is based on the principle that no person "shall be held criminally responsible for conduct for which he could not reasonably understand to be proscribed." *Colten* v. *Kentucky,* 407 U.S. 104, 110 (1972). "The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited." 407 U.S. at 110.

The statute in question provides that the proceedings before the Commission "shall be confidential and shall not be divulged by any person to anyone except the Commission" and further provides that "any person who shall divulge information in violation of the provisions of this section shall be guilty of a misdemeanor." There is nothing in these words which in any way can be construed to restrict the provisions of this section to persons who are participants in Commission proceedings, and the Supreme Court of Virginia has so found. The very words themselves impart to a person of reasonable intelligence fair notice that no one may divulge information about Commission proceedings.

In discussing statutory construction, this Court in *Vermilya-Brown Co.* v. *Connell,* 335 U.S. 377 (1948), stated:

> "Words generally have different shades of meaning, and are to be construed if reasonably possible to effectuate the intent of the lawmakers; and this meaning in particular instances is to be arrived at not only by a consideration of the words themselves, but by considering, as well, the context, the purposes of the law, and the circumstances under which the words were employed." 335 U.S. at 386.

To interpret the statute as contended for by Landmark would be to thwart its purposes and emasculate the Commission. The Virginia Supreme Court found that without confidentiality the Commission could not function properly or discharge effectively its intended purposes.

In its jurisdictional statement, Landmark also raises a vagueness issue as it relates to what materials are encompassed within the statute. This particular issue was not brought to the attention of the Supreme Court of Virginia and should not be considered by this Court. *Cardinale* v. *Louisiana,* 394 U.S. 437 (1969); *Hill* v. *California,* 401 U.S. 797 (1971).

CONCLUSION

In arriving at its decision in this case, the Supreme Court of Virginia has been sensitive to the commands of the First Amendment, and has balanced the competing interests in keeping with the decisions of this Court. In view of the reasons previously stated, the Commonwealth of Virginia submits that the judgment of the Supreme Court of Virginia should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James E. Kulp, Assistant Attorney General of Virginia, counsel for the appellee in the captioned matter and a member of the bar of the Supreme Court of the United States, do hereby certify that on the 20th day of May, 1977, I mailed, first class postage prepaid, three copies of the foregoing Motion to Affirm to Floyd Abrams, Esquire, 80 Pine Street, New York, New York 10005, and Conrad M. Shumadine, Esquire, 2030 Virginia National Bank Building, Norfolk, Virginia 23510, attorneys for appellant.

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